In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-131

M. PERRY GRANT AND SERVICE SECURITIES, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted on four counts alleging violations of the antifraud provisions of the federal securities and mail fraud laws, 15 U.S.C. 77q(a), 77x, 78j(b), and 78ff, and 18 U.S.C. 1341, and one count of conspiracy to commit the substantive offenses, 18 U.S.C. 371. Petitioner Grant was sentenced to con-

current prison terms of six months; petitioner Service Securities, Inc. (Service) was fined one dollar on each count.[1] The court of appeals affirmed (Pet. App.).

The facts, which are not in dispute, are set forth in the opinion of the court of appeals (Pet. App. 3-7). The evidence established, in essence, that petitioner, operating through Service, a securities broker-dealer, and in conjunction with others, defrauded public investors in connection with an offering of a new issue of stock in Data Industries Corporation of Texas, Inc. The evidence relating to petitioner's claim that the indictment was tainted by illegal electronic surveillance showed that beginning in July 1969 various justices of the New York Supreme Court issued a series of orders authorizing agents of the New York County District Attorney to intercept and record certain telephone conversations of two persons not involved in this prosecution. In September 1969, on the basis of information obtained in one of the wiretaps, the court authorized a wiretap on the telephones of one Karp, and in October authorization was granted to intercept conversations in Karp's apartment. The eavesdropping authorization was renewed four times at 30-day intervals. Among the conversations intercepted and recorded were several between Karp and petitioner relating to the stock issuance. Pretrial motions to dismiss the indictment and to suppress the tapes as evidence were denied.

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[1] Subsequent references to "petitioner" refer to Grant.

The only issues raised by the petition, relating solely to the lawfulness of the electronic surveillance, are without merit. As the court of appeals noted (Pet. App. 7), only two of the contentions were timely raised before the district court. These were that New York law does not authorize more than one 30-day renewal of an eavesdropping warrant and that it does not permit eavesdropping to investigate the crimes with which petitioners were ultimately charged. With respect to these arguments, which are renewed here (Pet. 7-10), we rely upon the opinion below (Pet. App. 8-9).

The petition seeks to raise three further arguments: that petitioner should have been notified within 90 days after termination of the surveillance that his communications had been intercepted; that there was no probable cause to issue the surveillance warrants; and that petitioner should have been named in the warrants. The first two of these contentions were not timely presented to the district court, and the court below properly concluded that they had been waived. See Fed. R. Crim. P. 12(b)(2); *United States* v. *Garnes*, 258 F.2d 530, 534-535 (C.A. 2), certiorari denied, 359 U.S. 937. The third was expresssly disclaimed by petitioners in their brief to the court of appeals, and it need not be considered here.[2]

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[2] Petitioners' Reply Brief below stated (p. 29): "The Government's Brief sets up a straw man in arguing there was no requirement that Grant be named in the orders. Appellants make no such argument * * *."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1972.

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